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July 14, 1993

RECEIVED**JUL 14 1993**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY* ADMITTED PA ONLY
* ADMITTED CA ONLY**BY HAND**William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554Re: MM Docket No. 93-25
Direct Broadcast Satellite
Public Service Obligations

Dear Mr. Caton:

Transmitted herewith on behalf of Educational Broadcasting Corporation, licensee of noncommercial educational television station WNET, Newark, New Jersey, are an original and nine copies of its Reply Comments in the above-referenced proceeding.

Respectfully submitted,

Barbara K. Gardner

Barbara K. Gardner

Enclosures

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 25) MM Docket No. 93-25
of the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Direct Broadcast Satellite)
Public Service Obligations)

To: The Commission

REPLY COMMENTS OF
EDUCATIONAL BROADCASTING CORPORATION

Educational Broadcasting Corporation, a leading producer of PBS programming as well as the licensee of noncommercial educational television station WNET(TV), Newark, New Jersey ("WNET"), hereby responds to those commenters in the above-captioned proceeding who urge that future providers of direct broadcast satellite service should be permitted to select the offerings of **commercial** entities to program the DBS capacity reserved by Congress for noncommercial educational purposes. As is shown below, Congress neither authorized DBS providers themselves to select the specific programming to be shown, nor

intended that commercial entities be permitted to supply such programming.^{1/}

I. INTRODUCTION

In Section 25(b) of the 1992 Cable Act, Congress

already meet established criteria for the receipt of either federal educational program funds, or federal instructional television licenses.

But some would-be providers of DBS programming or DBS service instead have suggested that the term "national educational program supplier" should include any entity, commercial or noncommercial, that provides noncommercial educational or informational programming (e.g., Comments of Discovery Communications at 6-7). Others support the FCC's proposed definition, but argue that "national educational programming suppliers" are not the exclusive pool from which DBS providers "may draw programming to satisfy their public service obligations" (e.g., Comments of DirecTV at 23). WNET submits that these statements reflect a basic misreading of Congress' purpose in enacting Section 25.

II. CONGRESS DID NOT INTEND DBS PROVIDERS TO PROGRAM THE NONCOMMERCIAL CAPACITY THEMSELVES, BUT INSTEAD TO PROVIDE ACCESS TO NONCOMMERCIAL EDUCATIONAL PROGRAMMERS.

DBS service providers appear to view the noncommercial presumption as a public service obligation they should be able to

providers to formulate the best line-up of public service programmers" (Reply Comments of Satellite Broadcasting and Communications Association ("SBCA") at 8), and that providers therefore "should have broad discretion to select from competing programs and program suppliers to fill the channel capacity set-aside in a manner consistent with their overall program objectives" (Comments of PRIMESTAR at 21). Indeed, DirecTV has already agreed with The Learning Channel that the latter will provide daily educational programming that "should count towards fulfilling DirecTV's statutory obligation" (Comments of DirecTV at 23 n.33), while USSB states point-blank that "[j]ust as broadcasters are entrusted to exercise licensee discretion to meet their public interest obligation[,] so should DBS providers similarly be entrusted to exercise their reasonable discretion to fulfil [sic] their public interest programming obligations" (Comments of USSB at 11-12).

However, Section 25(b) establishes no such programming obligation to be fulfilled by the DBS provider. Had Congress intended such a requirement, it would simply have included one within Section 25(a), wherein the Commission is directed to initiate a rulemaking "to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming" (emphasis added).

Such a requirement would have been analogous to Section 103 of the Children's Television Act of 1990, 47 U.S.C. § 303(b), mandating that television broadcasters serve the educational and informational needs of children through their overall programming.

Instead, Congress established in Section 25(b) a separate reservation or setaside of DBS capacity to be programmed not by the DBS provider, but by qualified "national educational programming suppliers" for whom guaranteed access is intended, much as reserved television broadcast channels are intended to be utilized only by qualified noncommercial educational entities. Thus, just as cable operators cannot exercise any editorial control over public, educational and governmental access channels (see 47 U.S.C. § 531(e)), DBS service providers are barred from exercising "any editorial control over any video programming provided pursuant to this subsection" (Section 25(b)(3)). And, just as a cable operator may use any vacant commercial leased access channels only until unaffiliated persons obtain their use (47 U.S.C. § 532(b)(4)), so here may DBS providers utilize any unused reserved channel capacity under Section 25(b) only until

Noncommercial Educational and Informational Programming," parallel to the headings of the same Act's mandatory carriage provisions (Section 4: "Carriage of Local Commercial Television Signals"; Section 5: "Carriage of Noncommercial Stations").

In sum, it is beyond doubt that Congress did not establish a scheme where the DBS provider would be permitted to implement Section 25(b) by "arranging the most attractive market place program package for consumers" (Reply Comments of SBCA at 6), as urged by such providers in direct contradiction to the statute. Rather, Congress envisioned a plan that might well be called "noncommercial leased access," whereby certain capacity may be programmed by the DBS provider only until a qualified noncommercial entity seeks access to it, at which point the DBS provider can no longer exercise editorial control over that capacity.

**III. ACCESS TO THE RESERVED DBS CAPACITY MUST
BE RESTRICTED TO NONCOMMERCIAL EDUCATIONAL
PROGRAMMERS.**

Congress did not intend to provide access to the reserved direct broadcast satellite capacity to commercial entities even if they provide commercial-free educational or informational programming, contrary to the assertions of DirecTv and others (Comments of DirecTv at 23, Comments of Mind Extension University at 6-7, Comments of Discovery Communications at 6-8).

The reservation requirement of Section 25(b) is to be met "by making channel capacity available to national educational programming suppliers," defined to "include[] any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions," all of whom, as shown below, are properly defined to be noncommercial. The statute does not declare that only "some" channel capacity need be made available to such programming suppliers, nor does it state that the term national educational programming supplier "includes but is not limited to" the three enumerated types of qualified noncommercial educational entities. WNET doubts that Congress, having nowhere mentioned

or predominantly noncommercial program service (a definition is

The Commission should adopt the suggested existing definitions to reinforce Congress' clear intent that programmers are not entitled to DBS access unless they are nonprofit or public entities. WNET also believes that commercial organizations should not be permitted to circumvent the statutory purpose by creating nonprofit subsidiaries as vehicles to obtain noncommercial access, particularly when their access is facilitated by other commercial relationships with the DBS provider. See Comments of USSB at 11.

Finally, it should be recalled that having provided access to qualified national educational programming suppliers to the full extent required by the law, a DBS provider will still retain 93 to 96 percent of capacity to program in any way it pleases. If the educational and informational programming produced by commercial entities is as important and valuable as commenters claim, they will be able to utilize it whether it qualifies for the noncommercial reserved capacity or not.

IV. CONCLUSION

The Commission should make clear to DBS providers that Congress did not intend for them to select the programs to be transmitted over the reserved noncommercial DBS capacity, or to utilize noncommercial programming supplied by entities under

commercial ownership or control for this purpose. Rather, Congress has established noncommercial leased access to a small fraction of DBS capacity, and the Commission should implement this carriage obligation so as to foster the maximum possible educational benefit to the American people.

RESPECTFULLY SUBMITTED,

EDUCATIONAL BROADCASTING
CORPORATION

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